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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

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OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS

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COMMONWEALTH OF MASSACHUSETTS,

Cross-Petitioner,

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.

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On Writs of Certiorari to
The United State Court of Appeals
For The First Circuit

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# BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF THE COMMONWEALTH OF MASSACHUSETTS

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## STATEMENT AND INTEREST OF AMICUS CURIAE

The State of California, like all the other States, participates in the cooperative federal-state program, known as Medicaid, which provides health care

services to needy persons. The State of California, again like all the other states, participates in the cooperative federal-state program, known as Aid to Families with Dependent Children ("AFDC"), which provides cash assistance to needy families. California also participates in the Food Stamp Program, operated by the Department of Agriculture, and the numerous programs that assist in the education of our children, operated by the Department of Education.

All of these programs, in one way or the other, involve grants of monies to the States to pay a portion of the costs necessary to carry out the federally designed programs. All the programs require the States to comply with federal standards in the use of the monies. All the programs are subject to period "audits" by the cognizant federal agency to determine whether the state is in fact

operating in accordance with its "approved plan" and the requirements of federal laws and regulations. The "audits" also examine the appropriateness of the State's expenditures and claiming procedures. When the audit agency making the survey for the cognizant federal agency believes that the State has not operated its program or filed its claims as required by federal law, it may propose a "disallowance". Since the States operate on quarterly advances of federal funds based on estimated expenditures, a "disallowance" is really nothing more than a request to reduce a future quarterly advance by the amount of the proposed "disallowance".

In the case of the Medicaid and AFDC programs, the U.S. Department of Health and Human Services ("HHS") has delegated to its Departmental Grant Appeals Board ("DGAB") the power to take the final

agency action on any dispute between a State and the branch of HHS which has proposed a "disallowance".

These disputes between HHS and the States over the validity of a proposed "disallowance" are not unique, once-in-a-lifetime events, they occur all the time. California, for example, may have 5 or 6 cases pending before the DGAB on any one day.

Needless to say, DGAB decisions are not often favorable to the States. It is of vital importance, therefore, to the States where and how those adverse DGAB decisions are judicially reviewed.

California does not maintain an office of the Attorney General in the District of Columbia. (We doubt that many, if any, of the other States do.) To require the States to initiate and maintain what has become routine litigation in a courthouse literally

thousands of miles away is, to say the least, unfair. We recognize, of course, that convenience of the parties cannot be the tail that wags the judicial dog. But it is not something that can be completely ignored when construing a statute to determine congressional intent.

## ARGUMENT

### A STATE WHICH SEEKS JUDICIAL REVIEW OF A DGAB DECISION IS NOT SEEKING "MONEY DAMAGES" FROM HHS

The federal agency has proceeded on the premise that the States are seeking "money damages" from HHS when they seek judicial review of a DGAB decision. That premise is wrong. It is based on a complete mischaracterization of the nature of DGAB decisions.

By their very nature, DGAB decisions necessarily deal, at least technically, with a past period. For example, HCFA in 1985 may "audit" a State's Medicaid program for the years 1980-83 and propose

a "disallowance" based on a determination that the State was not following federal requirements during that period. In 1987, the DGAB may have issued a decision upholding the HCFA action. But when the State seeks judicial review of that DGAB decision, it is not seeking "money damages" for some wrongful act allegedly committed by HHS in 1980-83, 1985 or 1987. (In fact, since the States are not required to adjust a claim to reflect the "disallowance" until after the DGAB decision is issued, it is very likely that the State still has the funds when the complaint is filed.)

Rather, when a State seeks review of a DGAB decision, its primary purpose is to test the validity of the policy and program compliance rulings made by the cognizant HHS branch and upheld by the DGAB.

In some cases, the DGAB decision may have only a retroactive effect. This would be true when there has been a change in the law or operative facts between the audited years and the DGAB decision. But those are the exception, not the rule. These federal-state programs such as Medicaid and AFDC are on-going programs with relatively static rules. Thus the typical DGAB decision will have on-going application. For example, HCFA may propose a "disallowance" based on its conclusion that the State erroneously provides Medicaid benefits to a group of persons that HCFA believes are not eligible for services. The final audit report may make three "determinations":

1. The State should repay the amount identified in the audit for the audited years;

2. The State should audit subsequent

years and adjust subsequent claims accordingly; and

3. The State should change its practice in the future.

If the DGAB approves the "disallowance", the real issue on judicial review is not whether the State should collect "money damages" for some past period. The real issue is whether the State is properly running its Medicaid program.

These types of policy issues can reach the courts in any number of ways. If the State is implementing the federal policy, welfare recipients may bring an action against the State in district court seeking an injunction to enjoin the policy and, if the State has waived the Eleventh Amendment, for retroactive benefits as well. The federal agency may be joined as a party defendant or, if not, it may be brought into the action by the State defendant by way of a third-party

complaint. That this is proper is beyond dispute. See Bowen v. Gilliard (1987) ____ U.S. ____, 97 L.Ed. 2d 485, 497; 107 S.Ct. 3008, 3014; 55 L.W. 5079, 5081; Heckler v. Turner (1985) 470 U.S. 184, 187-8. No one would seriously suggest that these cases should have been litigated as claims for "money damages" under the Tucker Act. If, on the other hand, the State had refused to implement the federal policy, the same issue would arise in a "disallowance" argument before the DGAB.

We urge this Court not to hold that the way the question comes up converts a clearly non-Tucker Act case into a claim for "money damages". To do so would place form over substance without any indication from Congress that it intended such a non-realistic approach.

We agree with the federal agency to the extent that it argues that judicial

review of DGAB decisions should not be bifurcated in some metaphysical attempt to divide the decision into two cases, one dealing with money and the other dealing with "policy". In most cases these distinctions do not exist.

But the answer is not to send all DGAB judicial review cases to the Claims Court. That would most certainly be wrong. (For example, a State's suit asking review of a DGAB decision in which the State was alleging that the DGAB erred in excluding certain evidence at the hearing, would not be considered a suit for "money damages" under anyone's definition.)

To the contrary, the answer is to recognize that, even though DGAB decisions do have a monetary impact, review of those decisions does not constitute a claim for "money damages" against HHS. Thus, judicial review of DGAB decisions resides

in the district courts, which have traditionally dealt with the very type of issues which are the subject of DGAB decisions.

Nor are there any policy reasons to support the federal agency's position. The Secretary's claim that adjudication of these types of cases should be centralized in one court is not supportable. To the contrary, the type of issues raised in DGAB reviews are much like the issues traditionally decided by district courts in actions brought by welfare recipients to test the validity of federal or state policies. It makes no more sense to say that all DGAB reviews must be decided by a single forum that it would to say that all actions involving federal programs must be brought in one forum.

On the other hand, the burden on the States, particularly those like California that are located thousands of miles from

the District of Columbia, would be tremendous if all its welfare litigation involving HHS had to be conducted on the east coast. The programs are operated in California. The records are maintained in California. The "audits" are conducted in California by HHS personnel who reside in California. The attorneys for the State maintain their offices in California. Normally, the lawyers for HHS are local U.S. Attorneys and "house counsel" for HHS who maintain their offices in California. It just does not make sense to make a strained and overly narrow reading of the Administrative Procedure Act statutes just to shift all this routine litigation to one court on the east coast.

## CONCLUSION

The position of HHS should not be adopted. This Court should hold that judicial review of DGAB decisions should remain where it traditionally has been, to wit, in the district courts for the state that is the subject of the DGAB decision.

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Respectfully submitted,

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